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No. 89-1462

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THOMAS M. HAAS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases

	Page
Morrissey v. *Brewer*, 408 U.S. 471 (1972)	2, 4, 5
United States v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983)	4, 5, 6, 7
United States v. *Lovasco*, 431 U.S. 783 (1977)	3, 4
United States v. *Marion*, 404 U.S. 307 (1971)	4
United States v. *Tyler*, 605 F.2d 851 (5th Cir. 1979)	3, 5, 6, 7

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The United States concedes that after learning the complete circumstances of petitioner's probation violation, it delayed, without any explanation, for at least 15 months, and more likely for 22 months, before seeking to revoke his probation. Opp. 13 & n.17.[1] In fact the United States acknowledges that the delay was attrib-

[1] In the court below, the United States declared unequivocally that the delay was 22 months. Pet. 5 n.2. Petitioner accepted that statement in drafting the petition because the United States Attorney in Alabama, who prepared the brief in the court of appeals, was in the best position to know what his clients knew and when. The Solicitor General, however, now complains that "[a]lthough the government certainly knew of petitioner's illicit activity in February 1987," it "did not learn of the full extent" of the violation until petitioner provided a detailed written statement of the relevant events seven months later. Opp. 13. While the government may have learned additional details in August, the government's own statement of the undisputed record makes clear that *petitioner* himself notified every relevant federal official—including his probation officer—in February 1987. Opp. 4-5 nn.4 & 5. Thus, in fact, the delay was 22 months.

utable to nothing more than a random change in government personnel: Petitioner's original probation officer resigned from service in September, 1988 and was replaced by someone who applied different standards to reach a different conclusion, without regard to whether that change in any way promoted the rehabilitation purposes of the probationary system. Opp. 6, 14 n.18.

The revocation of probation under such circumstances serves no legitimate objective and, in fact, frustrates the purposes of the probationary system. It is undisputed that, during the 22 month delay, petitioner conformed his behavior to every condition of his probation. At the time of the revocation, he was a responsible and law-abiding citizen with a thriving charter airline business, which had a client list that included a United States Senator. By revoking petitioner's probation, the United States shattered petitioner's personal and professional life and ignored its own "stake in whatever may be the chance of restoring him to normal and useful life within the law." *Morrissey* v. *Brewer*, 408 U.S. 471, 484 (1972). In light of the utter lack of support for the government's conduct, the United States' technical legal analysis in response to the petition is both cynical and wholly inadequate.

What the government's brief does demonstrate quite forthrightly is that the legal issue of unexcused delay in bringing a revocation action is squarely presented in this case. Moreover, the government makes no claim that that issue is not important or that it is not recurring. Instead, it argues that revocation was appropriate on the merits, even after a 22 month delay, and that the conflicting holdings in the circuits can be distinguished on factual grounds. Neither of these arguments has merit and therefore the Court should grant the petition to resolve the fundamental question of law presented, which has divided the courts of appeals.

1. The United States' central argument in opposition to the petition is that the result reached below is correct

under the standard applicable to pre-indictment delay. Opp. 11-12 (citing *United States* v. *Lovasco*, 431 U.S. 783 (1977)). Under the *Lovasco* standard, a party must show proof of (1) actual prejudice and (2) intentional misbehavior or bad faith conduct on the part of the government designed to obtain tactical advantage. Opp. 11-12. Thus, based on the analogy between preindictment delay and delay in revocation proceedings, the United States concludes that because petitioner failed to prove prejudice and bad faith misconduct (as required under the *Lovasco* standard), the courts below did not err in revoking probation despite the unexcused delay.[2] Opp. 12 n.16 (because of failure to prove prejudice, "petitioner would not be entitled to relief under . . . *Lovasco*"); Opp. 14 n.18 ("there is no basis for drawing any negative inference" of bad faith from fact that "replacement probation officer imposed a more stringent regime of supervision").

The argument based upon *Lovasco* provides no basis for denying review in this case. Whatever the merits of the government's analogy, the fundamental point for purposes of certiorari is that two other circuits have *not* followed the *Lovasco* standard and have instead found an abuse of discretion or due process violation based on undue delay without any demonstration of prejudice or bad faith. For example, in *United States* v. *Tyler*, 605 F.2d 851 (5th Cir. 1979), the Fifth Circuit analyzed a lengthy delay in seeking revocation in light of the unique "interests of both society and the probationer" and the goals of the probation system. *Id.* at 853; see also *id.*

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[2] Petitioner does not disagree with the United States (Opp. 10, 13 n.17) that the interests of justice are not served by requiring a probation officer to move to revoke immediately after a possible violation. But a holding that the United States cannot wait 22 months before seeking revocation at the request of a new probation officer who relies upon no new violations will not interfere with the government's legitimate interest in having a full opportunity to evaluate whether a violation warrants revocation in light of all of the circumstances.

("unreasonable delay in bringing charges of violations or a piecemeal approach in seeking revocation will rarely, if ever, serve the interest of either [society or probationer]"). The Fifth Circuit concluded—without any discussion of *Lovasco* or the standards applicable to pre-indictment delay—that such a delay was "fundamentally unfair" and a violation of due process.

Similarly, in *United States* v. *Hamilton*, 708 F.2d 1412 (9th Cir. 1983), the Ninth Circuit, in an opinion by then-Judge Kennedy, concluded that:

> The interests of fairness require some level of consistency in the supervision of a probationer. If a newly assigned probation officer intends to enforce probation conditions more stringently than his predecessor, the probationer must be advised of that policy before its violation can become the basis for revocation. *Id.* at 1415.

Thus, the Ninth Circuit concluded—again without any reference to *Lovasco* or to its standards—that revocation of probation following an unreasonable delay (resulting from a change in probation officers) constituted an abuse of discretion. *Id.* at 1416.

In sum, at least two circuits have—with good reason [3]—decided this issue without reference to the *Lovasco*

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[3] The decision of the Ninth and Fifth Circuits not to look to the pre-indictment delay cases for an analogy was reasonable. As *Lovasco* itself makes clear, "statutes of limitations, which provide predictable, legislatively enacted limits on prosecutorial delay, provide 'the primary guarantee against bringing overly stale criminal charges.'" *Lovasco*, 431 U.S. at 789 (quoting *United States* v. *Marion*, 404 U.S. 307, 322 (1971)). Therefore, in the context of pre-indictment delay, "the Due Process Clause has a limited role to play in protecting against oppressive delay." *Id.* The United States' analogy (Opp. 10-14) ignores the differences between delay in the context of indictment and in the context of probation revocation.

Probation is supposed to be a constructive, as well as punitive, process and probation should be revoked only when the probationer cannot be counted on to avoid antisocial activity. See *Morrisey*, 408 U.S. at 479-480; *Hamilton*, 708 F.2d at 1415. The delay in this case

standards and in a manner flatly contrary to the position advocated by the United States in this Court and in the court below. Even if those courts are wrong (and they are not), the correct response would not be to deny certiorari, but to grant the petition and establish a uniform federal standard.

2. The United States is plainly incorrect in arguing that the holding below is not "squarely" in conflict with *Hamilton* and *Tyler*. The government argues that those cases are not necessarily inconsistent with the government's theory because they "do not expressly disavow an inquiry into prejudice and bad faith conduct on the part of the government." Opp. 15. The dispositive point, of course, is that neither case even mentions such an "inquiry" or the *Lovasco* case on which it is based. Moreover, the natural reading of those cases is that those courts clearly do not require such an inquiry; in both cases, a revocation order was vacated without any evidence of prejudice or bad faith within the meaning of *Lovasco*. That is precisely the reading that the United States gave those cases below, when it urged the Eleventh Circuit not to follow them. Had the Eleventh Circuit not followed the United States' urging and departed from the Fifth and Ninth Circuits' standard, petitioner would be free today.[4]

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meant that revocation proceedings were initiated after petitioner had become settled in his family life, in his growing business and in his community. See Pet. 3. Indeed, the legislative interest in rehabilitation which underlies the probationary system—and the need for fairness, accuracy and consistency (see, *e.g.*, *Morrissey*) in support of that interest—suggests that a delay in revocation proceedings of 15-22 months based on nothing more than the shifting preferences of individual probation officers should be *per se* impermissible.

[4] The government's argument in this respect has presented something of a moving target. When petitioner first complained of delay, in the district court, the United States simply did not respond

The United States also argues that the Fifth and Ninth Circuit decisions can be distinguished on the ground that "in each case" government conduct "misled the probationer into believing that any violation would not be used against him." Opp. 15. However, this effort to distinguish the *Hamilton* and *Tyler* actions simply misstates the plain holding of the two cases:

> Revocation of probation after unreasonable delay *or* under circumstances inherently misleading to the probationer is an abuse of discretion. See *United States* v. *Tyler*, 605 F.2d 851, 853 (5th Cir. 1979) (emphasis added).

Hamilton, 708 F.2d at 1415.[5] In stating the test in the disjunctive, the *Hamilton* opinion makes clear that either unreasonable delay or misleading circumstances could constitute an abuse of discretion. See also *id.* ("At some point, however, violations . . . become stale or are waived as a basis for revoking probation").

In any case, even if *Hamilton* and *Tyler* could be read to require a showing of "circumstances misleading to the

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and the district court did not address the issue. Opp. 9 & n.13. Then, in the Eleventh Circuit, when petitioner relied upon the Fifth and Ninth Circuits' decisions to support his claim based on delay, the United States acknowledged the conflict and urged the court of appeals not to follow those decisions but to affirm the revocation on the ground that the district court record did not support a showing of actual prejudice and deliberate misconduct on the part of the government. Opp. 9 n.14; see Pet. App. 10a. Now, the United States argues that those cases are in fact correct and that there is no conflict.

[5] The United States also attempts to distinguish the result in *Tyler* and *Hamilton* on the ground that the delays in those cases, 27 and 36 months respectively, were more egregious than the 15 to 22 month delay in this case. Opp. 15. But, the fact that the delay in those cases was longer does not mean that the delay in this case is acceptable. Moreover, the Ninth Circuit in *Hamilton* held that delay attributable to nothing more than a change in probation officers is in itself an abuse of discretion. See *Hamilton*, 708 F.2d at 1415.

petitioner," the undisputed facts in this case are more than sufficient to sustain such a showing. The United States' brief quotes petitioner's original probation officer as expressing the "understanding after this [August, 1987] meeting at Judge Hand's office that there would be no action taken against [petitioner] unless he was prosecuted in connection with the [Tharp trial]." Opp. 8 n.12. *After* the meeting at which this "understanding" developed, petitioner voluntarily and without immunity provided the testimony that assisted in Tharp's conviction. Opp. 5-6. That same testimony then led to petitioner's own probation revocation and imprisonment. Opp. 5-6; see Opp. 7 n.9 (arguing that probation revocation supported by petitioner's testimony at Tharp trial). Thus, to the extent there is some requirement that the government must "mislead" a probationer, the evidence here is at least as strong as in *Tyler* and *Hamilton*.

At bottom, the conflict among the circuits on this issue is clear: Had petitioner been on probation in California or Texas, the unreasonable and unjustifiable delay in seeking to revoke his probation would have resulted in that order being vacated on appeal—without inquiry into whether the government acted in bad faith or misled petitioner or whether petitioner was prejudiced by the delay. The United States recognized this potential result when it candidly urged the court of appeals below not to follow the Ninth or Fifth Circuit. Given the fundamental unfairness of the result sanctioned by the decision below and the conflict among the circuits on this issue, this Court should grant the petition and provide guidance on this fundamental and recurring question of federal law.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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